



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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Dear [REDACTED]:

I am responding to your letter requesting a ruling for a refund of social security taxes paid by the [REDACTED] on behalf of employees covered by the [REDACTED] Public Employees Retirement System ([REDACTED] PERS). You also request information on how to recover the overpayment of employment taxes. We have enclosed a copy of IRS Publication 15, Circular E, Employer's Tax Guide which contains guidance on this issue in Section 13, Reporting Adjustments on Form 941, for your information.

Unfortunately, we cannot issue you a ruling because your submission does not meet the requirements for requesting a private letter ruling. Revenue Procedure 2000-1, 2000-1 I.R.B. 4, sets forth procedures for requesting letter rulings. In the absence of a request for formal guidance, we can only provide general information.

Generally, services performed in the employ of a state or its political subdivisions are excepted from employment for purposes of the Federal Insurance Contribution Act (FICA). Section 3121(b)(7). There are, however, exceptions to the rule. State and local government employees who began performing services after March 31, 1986, are exempt from the Old Age Survivors Disability Insurance (OASDI) portion of FICA tax so that services provided by such employees are only subject to the hospital insurance (HI or Medicare) portion of FICA tax. Section 3121(u)(2).

For services provided after July 1, 1991, by individuals employed by state or local government, the FICA tax liability depends upon their coverage by a state or local government retirement plan and their FICA liability before that date. Section 3121(b)(7)(F). The services of the individuals covered by a retirement plan of the state or local government are generally exempted from FICA, but if the individuals began performing services after March 31, 1986, the exemption would be limited to the OASDI

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portion of FICA (and Medicare liability would be imposed). The services of an individual not covered by a state or local government retirement plan is generally subject to all portions of the FICA tax. If an individual was previously exempt from the OASDI portion of the FICA tax and has been in continuous employment with the same employer since March 31, 1986, that individual's services will continue to be exempt.

Section 6413(a) of the Code provides that if more than the correct amount of employer or employee FICA tax is paid on any payment of remuneration, proper adjustments, of both the tax and the amount to be deducted, must be made, without interest, as prescribed by regulations. Section 6413(b) of the Code provides that if more than the correct amount of employer or employee FICA tax is paid on any remuneration, and the overpayment cannot be adjusted under section 6413(a) (because the overpayment relates to a period with respect to which the return has already been filed), the amount of the overpayment must be refunded as prescribed by regulations.

Section 31.6413(a)-1(b)(1)(i) of the Employment Tax Regulations provides that when the employer ascertains that it has paid more than the correct amount of employee tax under section 3101 after the return reporting the payment has been filed, the employer "shall repay or reimburse the employee" if the error is ascertained within the applicable limitations period. However, the employer is exempted from the refund requirement if the overcollection and overpayment to the district director is "made the subject of a claim ... for refund or credit, and the employer elects to secure the written consent of the employee to the allowance of the refund or credit under the procedure provided in [section 31.6402(a)-2(a)(2)(i)]."

Based on the provisions of the Code and the regulations, we suggest that to the extent there has been an overcollection of employee FICA tax from the wages of an employee paid in a prior year that is still open under the period of limitations, the employer should repay or reimburse the employees in the amount of the overcollection before the expiration of the limitations period. Section 31.6413(a)-1(b)(1)(i). The employer should obtain and keep as part of its records the written receipt of the employee, showing the date and amount of the repayment and stating that (a) the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) the employee will not claim refund or credit of such amount. Section 31.6413(a)-1(b)(1)(ii).

After repaying or reimbursing the employees and obtaining the requisite employee certifications, the employer may correct the prior errors by claiming credit for the employee FICA on the Form 941 for the period in which the error was ascertained or on the Form 941 for the return period following the return period in which the error was ascertained. Section 31.6413(a)-2(a). The employer must provide background

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information and certifications supporting prior quarter adjustments. The employer should file with Form 941 and Form 941c, Supporting Statement To Correct Information (copy enclosed), or attach a statement that shows:

- What the error was.
- Quarter in which the error was made.
- That the employer repaid the employee tax or received from each affected employee a written consent to this refund or credit.
- That the employer received from the employee a written statement that he or she will not claim a refund or credit for the amount of the overcollected social security and Medicare taxes.

Section 31.6402(a)-2(a)(2).

Alternatively, if the employer no longer files Form 941s because all employees are not subject to any portion of FICA, the employer is therefore unable to adjust the overpayment by using the procedure above so the employer may file claims for refund via Forms 843 (copy enclosed).

I hope this information is helpful to you. If you need additional information, please contact me or Kyle Orsini of my staff at (202) 622-6040.

Sincerely,

Will E. McLeod
Assistant Chief, Employment Tax Branch 1
Office of Associate / Division Chief Counsel
(Tax Exempt and Government Entities)